Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NJD:NEW:TL-N-3278-99
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date: JUL 22 1999

to: Chief, Examination Division, New Jersey District

from: District Counsel, New Jersey District, Newark

subject: [redacted] and [redacted]

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FACTS:

[redacted] and [redacted] filed separate tax returns for the [redacted] and [redacted] taxable years. The taxpayers received refunds in each of the taxable years. During such years, the taxpayers were married and eligible to file a joint tax return pursuant to I.R.C. section 6013(a).[1] Statutory notices of deficiency were issued to each taxpayer for the [redacted] and [redacted] taxable years. Both taxpayers defaulted on the notices and additional taxes and penalties were assessed. The taxpayers tax accounts reflect:

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[1]This is an assumption based upon the information provided by PRP.

[redacted]

	[redacted]	[redacted]
Tax on Return	$[redacted]	$[redacted]
Payments:		
Withholdings	$[redacted]	$[redacted]
Earned Income Tax Credit	[redacted]	[redacted]
Refund Received	$[redacted]	$[redacted]
[redacted] Tax Assessment	$[redacted]	$[redacted]
Interest	[redacted]	[redacted]
Penalty	[redacted]	[redacted]
EIC Reversal	[redacted]	[redacted]
Total Owed	$[redacted]	$[redacted]

[redacted]

Tax on Return	$[redacted]	$[redacted]
Payments:		
Withholdings	$[redacted]	$[redacted]
Refund Received	$[redacted]	$[redacted]
[redacted] Tax Assessment	$[redacted]	$[redacted]
Penalty	[redacted]	[redacted]
Interest	[redacted]	[redacted]
Tax Owed	$[redacted]	$[redacted]

On [redacted], the taxpayers' representative filed a 1040X for the [redacted] and [redacted] taxable years requesting to change the filing status to married filing joint. The following reflects the joint return:

	[redacted]	[redacted]
Tax on Return	$[redacted]	$[redacted]
Total Taxes Paid	[redacted]	[redacted]
Total Refunds Received	[redacted]	[redacted]
Amount Due	$[redacted]	$[redacted]

The taxpayers did not submit payment of the tax due with the joint returns. It appears that the taxpayers were not notified that payment of the amount due was required to be submitted with the returns before they could be accepted. During November of [redacted] the taxpayers' representative contacted the Service Center to determine the status of the amended return. In response to the contact, the Assistant Chief, Compliance Division of the Brookhaven Service Center sent a letter to the representative dated [redacted] apologizing for the delay in processing the return. The letter acknowledged that the representative was referred to several individuals within the Service who did not resolve the issue. The issue was referred by the Service Center to the Problem Resolution Program in Newark, New Jersey. The taxpayers' representative conveyed to PRP that the taxpayers were willing to pay the outstanding liability in order to have the amended returns processed. However, the representative was instructed not to make payment. After reviewing the amended returns, PRP notified the representative through a letter dated [redacted] that the returns would be accepted as filed and the joint filing status would be allowed. On [redacted] PRP attempted to process the separate returns into a single joint return for the [redacted] and [redacted] taxable years. At that time, PRP was advised by the accounts unit in Brookhaven that the statute was barred and the returns could not be combined.

ISSUES:

PRP has requested advice to determine:

1) Whether the [redacted] and [redacted] taxable years are barred thereby precluding the joint filing status since combining the returns will require the taxpayers to make payments of $[redacted] in [redacted] and $[redacted] in [redacted]?

2) Are the claims considered valid because we failed to take the proper actions required by the manual to notify the taxpayer that payment is required?

3) Does the fact that we did not solicit payment at the time the representative was advised the joint filing status was accepted effect the determination as to whether or not the statutes are barred?

4) Are the claims invalid because payment was not received at the time they were received by the Brookhaven Service Center?

DISCUSSION:

This advice is divided into two parts. The first part discusses whether the statutory requirements of Section 6013(b)(2) have been complied with. The second part discusses whether the Doctrine of Equitable Estoppel is applicable to the Service in this case.

1) Statutory Requirements

I.R.C. section 6013(b)(1) provides, in part, "except as provided in paragraph (2), if an individual has filed a separate return for a taxable year for which a joint return could have been made by him and his spouse under subsection (a) and the time prescribed by law for filing the return for such taxable year has expired, such individual and his spouse may nevertheless make a joint return for such taxable year." For the taxable years at issue, section 6013(b)(2) provided:

> "the election provided for in paragraph (1) may not be made -
>
> (A) unless there is paid in full at or before the time of the filing of the joint return the amount shown as tax upon such joint return;[2] or (B) after the expiration of 3 years from the last date prescribed by law for filing the return for such taxable year (determined without regard to any extension of time granted to either spouse); or (C) after there has been mailed to either spouse, with respect to such taxable year, a notice of deficiency under section 6212, if the spouse, as to such notice, files a petition with the Tax Court within the time prescribed in section 6213; or (D) after either spouse has commenced a suit in any court for the recovery of any part of the tax for such taxable year; or (E) after either spouse has entered into a closing agreement under section 7121 with respect to such taxable year, or after any civil or criminal case arising against either spouse with respect to such taxable year has been compromised under section 7122."

Section 6013(b)(4) provides that if a joint tax return is made under subsection (b), the periods of limitations provided in sections 6501 and 6502 on the making of the assessments and the beginning of levy or a proceeding in court for collection shall with respect to such return include one year immediately after the date of the filing of such joint return. The Internal Revenue Manual provides that if the tax shown as owed on a joint return

[2]This requirement was eliminated for tax years beginning after July 30, 1996.

is not fully paid and both taxpayers previously filed separate returns, the claim should be returned to the taxpayers indicating that full payment must be submitted with the return.

In Johnson v. Commissioner, 90-2 USTC ¶ 50,375, the taxpayers initially filed separate returns for the 1980 taxable year. On December 27, 1983, they filed an amended return attempting to change their filing status to married filing joint. The taxpayers did not pay the amount of tax owed at or before the filing of the joint return. Subsequently, the taxpayers filed another amended return with payment of the tax due on April 27, 1984. The court held that taxpayers did not comply with section 6013(b) since the payment of the tax owed was not made until after the December 27, 1983 filing date. Although payment was made with the second amended return, the amended return was not filed within three years from the due date of the 1980 return.

In our case, the taxpayers filed their joint return (1040X) for [redacted] and [redacted] on [redacted], within three years from the due date for each year's return. However, the taxpayers did not submit payment for the amounts due for each taxable year. Section 6013(b) clearly requires that the amount shown as tax upon the joint return be paid in full ***at or before*** the time of the filing of the joint return. As such, the taxpayers were not entitled to a joint filing status pursuant to section 6013(b) for the [redacted] and [redacted] taxable years. Since the taxpayers were not entitled to "make" a joint return under section 6013(b), the additional time for assessment under section 6013(b)(4) was not in effect for the [redacted] and [redacted] taxable years.[3]

PRP indicated that the IRM procedure of notifying the taxpayers that full payment is required with a joint return was not complied with. Non-compliance with IRM requirements does not

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[3]PRP in their memorandum indicate that when an attempt was made on [redacted] to process the separate returns into a joint return they were advised that the statute was barred and the returns could not be processed. The PRP representative believed that the one year statute for assessment pursuant to section 6013(b)(4) was in effect. Therefore, since the Service attempted to make the joint assessment beyond one year from the filing date of the amended return it was time barred. Please be advised that the one year period for assessment pursuant to section 6013(b)(4) was never in effect since a valid joint return pursuant to section 6013(b) was not filed. The assessments were barred because the date that the Service attempted to process the amended returns was beyond three years from the due date of each year's return.

render the action of the IRS invalid and the procedures of the IRS do not have the force or effect of law. Vallone v. Commissioner, 88 TC 794 (1987). See also U.S. v. Horne, 714 F.2d 206, 207 (1st Cir. 1983)(IRM requirements are necessarily merely directory and not mandatory and noncompliance does not render the action of the respondent invalid). Therefore, the fact that the taxpayers were not notified pursuant to the IRM procedures is non-consequential in determining whether they are entitled to a joint filing status under section 6013(b).

The taxpayers' representative expressed that the taxpayers were willing to pay the amount of tax due in order to have the joint returns processed. In regards to the [redacted] taxable year, a payment would not have rendered the election under section 6013(b) valid. The due date for filing for the [redacted] taxable year was [redacted]. The amended return was filed exactly three years later on [redacted]. Section 6013(b)(2)(B) requires that the election to file a joint return be made with full payment of the tax due within three years from the last day for filing the return for such year. The taxpayers would have been beyond three years from the due date of the [redacted] return if the amended return was resubmitted with full payment. In regards to the [redacted] taxable year, the taxpayers had until [redacted] to resubmit the amended return with full payment. Pursuant to section 6013(b)(4), the Service would then have one year from the date of filing the second amended return to make the joint assessment. Considering the specific facts of this case, a court could determine that this is an appropriate case to apply the Doctrine of Equitable Estoppel to the Government with respect to the [redacted] taxable year. This issue will be examined in the second part of this discussion.

PRP has indicated that the taxpayers also filed on [redacted], a joint return for the [redacted] taxable year after filing separate returns. As with the [redacted] and [redacted] taxable years, the taxpayers did not pay the tax due on the joint return. The due date for filing a return for the [redacted] taxable year was [redacted]. Therefore, the taxpayers have until [redacted] to resubmit the amended return with full payment. Please note, section 6013(b)(2)(A) specifically requires that the payment of the tax due be made ***at or before*** the filing of the joint return. Therefore, if the taxpayers made payment without resubmitting a joint return prior to [redacted] it would not render the [redacted] joint return valid. See Johnson v. Commissioner, 90-2 USTC ¶ 50,375. The taxpayers need to resubmit a joint return for the [redacted] taxable year along with a payment of the tax due prior to [redacted].

In question 3 the PRP asked, "does the fact that we did not solicit payment at the time the representative was advised the joint filing status was accepted effect the determination as to whether or not the statutes are barred?" As mentioned above, the taxpayer was already time barred from resubmitting a joint return with payment for the [redacted] taxable year. Therefore, a payment of the tax owed would have been non-consequential. With respect to the [redacted] taxable year, payment alone would not have rendered the joint return filed on [redacted] valid under section 6013(b). The taxpayers were required to resubmit a joint return prior to [redacted] with full payment of the tax due. As such, the failure to solicit payment was not determinative of whether the statutes were barred. [redacted].

2) Doctrine of Equitable Estoppel

The United States Court of Appeals for the Third Circuit has applied the Doctrine of Equitable Estoppel to the IRS. See Fredericks v. Commissioner, 126 F.3d 433 (3rd Cir. 1997). The traditional elements of Equitable Estoppel are: 1) misrepresentation, 2) reliance and 3)detriment. The courts consider certain factors beyond the traditional elements of estoppel in determining whether to apply the doctrine to the Government. We will discuss the factors and consider whether they are present in this case.

1) Misrepresentation.

The Third Circuit has articulated that "affirmative misconduct" on the part of the Government must be established prior to finding Equitable Estoppel applicable to the Government. Id.; U.S. v. Asmar, 827 F.2d 907, 912 (3rd Cir. 1987). In Fredericks, the taxpayer mailed to the Service a Form 872-A (an indefinite extension of the statute of limitations) for the 1977 tax year. The taxpayer was later informed that the extension was never received and was probably lost in the mail. Subsequently, the Service requested on three separate occasions that the taxpayer sign a Form 872. The last form signed extended the statute until June 30, 1984. Based upon the Service's representation that Form 870-A was never received, the taxpayer concluded that the government lacked authority to assess a deficiency on his 1977 income tax return after June 30, 1984. At some point the Service discovered that it possessed the signed Form 872-A. The Service never informed the taxpayer that the Form was on file. On July 9, 1992, the Service mailed a statutory notice of deficiency to the taxpayer for the 1977 taxable year. The Circuit Court held that, "the IRS' misleading silence after finding and deciding to rely on the Form 872-A, coupled with its failure to notify Fredericks of its decision and its effective revocation of the third Form 872 constituted affirmative misconduct". The Court reasoned that the Service lulled the taxpayer into believing that the Form 872-A was not on file. Therefore, the taxpayer had no reason to believe that it was necessary to file a Form 872-T to terminate the extension.

In our facts, the [redacted] joint return could have been processed if it was resubmitted with full payment by [redacted]. The taxpayers' representative first contacted the Service regarding the status of the amended return in [redacted] of [redacted]. The Service had five months to inform the taxpayers' representative that full payment was required. When the representative mentioned that the taxpayers were willing to pay the taxes due in order to have the return processed he was specifically instructed not to make payment. This appears to be case in which a court may find "affirmative misconduct" on the part of the Service. As in Fredericks, by instructing the representative not to make payment, the Service "lulled inaction" on the part of the taxpayers.

2) Reliance.

A party claiming equitable estoppel must demonstrate that they reasonably relied on the misrepresentation. Reliance is not reasonable if the party claiming the estoppel knew or should have known that its adversary's conduct was misleading. See Heckler v. Community Health Services of Crawford, 467 U.S. 51, 59 (1984)(Those who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law). In our facts the taxpayers were represented by a Certified Public Accountant. Therefore, it can be argued that the taxpayers should have known that full payment was required with the amended return. However, when considering all the facts and circumstances of this case, it is conceivable that a court may find that the reliance on the part of the taxpayers was reasonable. This does not appear to be a case in which the taxpayers' representative was negligent in not being knowledgeable of statutory requirements. The representative stated to PRP that the taxpayers would do whatever it takes to process the return including making full payment of the tax due. However, the Service specifically told the representative not to make payment. In Heckler v. Community Health Services of Crawford, in holding that the reliance on the part of the taxpayer was unreasonable, the Court pointed out that the taxpayer neither requested nor received formal written advice from the Government. In our case, the taxpayers' representative did request and received written advice providing that the return was accepted. It does not appear that the taxpayers' representative acted unreasonably in relying on the Services' affirmation that the return was accepted.

In governmental-estoppel cases, reasonable reliance is more likely to be found if three factors exist: a) if the government agents had authority to engage in the acts or omissions at issue; 2) if the agents misrepresentation was one of fact, not law; and 3) if the government benefitted from its misrepresentation. Id. In Ritter v. United States, 28 F.2d 265 (3d Cir. 1928), the taxpayer was told by a Service representative that it was not necessary to file a formal request for refund. When the taxpayer subsequently learned a formal claim was required to be filed it was time barred. The Court refused to estop the IRS from evoking the statute of limitations. The Court reasoned that since the IRS employee lacked the authority to waive statutory requirements, the taxpayer's reliance on the representation was unreasonable.

In our case, it is statutorily required that full payment be made at or before filing the amended return for the [redacted] taxable year. A representative of the Service is clearly not authorized to waive this requirement. Therefore, it can be argued that it was not "reasonable" for the taxpayer to rely on a statement that payment was not required. (b)(7)a, (b)(5)(AC) [redacted]

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC) [redacted].

3. Detriment.

On [redacted] the taxpayers' representative was informed that the amended return for the [redacted] taxable year was accepted as filed. He was never informed that payment was required in order to process the amended return. If the representative was told payment was necessary, there was sufficient time to resubmit the amended return with full payment of the amount due. The joint assessment would have been less than the combined separate assessments. Therefore, the taxpayers suffered a detriment due to the Service's misrepresentation.

4. Impact on the Public Fisc.

Courts are more likely to estop the government when Congress' power to control public expenditures is only minimally impacted. See Schweiker v. Hansen, 450 U.S. 785, 790-93 (1981). In our case, it is clear that finding that the government is estopped from denying the joint assessment would not have a substantial impact on the public fisc.

CONCLUSION:

It is clear that the statutory requirements of I.R.C. section 6013(b)(1)&(2) have not been met in this case for either the [redacted] or [redacted] taxable years and that, absent any equitable consideration, the taxpayers' attempt to claim joint status would fail. (b)(7)a, (b)(5)(AC) (b)(7)a, (b)(5)(AC) [redacted] (b)(7)a, (b)(5)(AC) [redacted]. Please note that it is our position that Equitable Estoppel is not applicable to the Service with respect to the [redacted] taxable year. As discussed above, the taxpayers submitted the joint return exactly three years from the due date of the [redacted] return. Even if the taxpayers were properly informed that full payment was required there was no time left on the statue to resubmit the return with full payment.

If you have any questions please contact attorney Anthony Ammirato at 973-645-2539.

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